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SENT VIA EMAIL (oal_amendsingle@deltacouncil.ca.gov)

Anthony Navasero, P.E., Senior Engineer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

**RE: Single-Year Water Transfer Amendments
September 29, 2016, Agenda Item 11**

Dear Mr. Navasero:

Local Agencies of the North Delta (“LAND”)¹ submits the following comments on the Delta Stewardship Council’s (“DSC’s”) Final Addendum to the Delta Plan Programmatic Environmental Impact Report (“Addendum”) and the proposed adoption of the relating amendment to the Delta Plan.

LAND is concerned about the environmental effects of what the DSC has characterized as short-term water transfers in the Delta because the Delta already faces interrelated problems of instream flow deficits, water quality impairments, and degraded aquatic habitats. Allowing single-year water transfers to permanently forego the consistency review process would worsen those existing problems. For example, transfers based on groundwater substitution exacerbate river depletions, thereby reducing flows into the Delta. Transfers can also further imperil endangered species. Continuing single-year water transfers without any DSC oversight worsens these conditions.

A. This Addendum Is Inappropriate Because There Is No Longer a Project to Amend

It is improper for DSC to adopt an addendum to the Delta Plan Programmatic Environmental Impact Report (“PEIR”) because the Delta Plan itself has been invalidated. As the Addendum admits, pursuant to the May 18 and July 11, 2016 Orders of Sacramento Superior Court Judge Kenny (“Rulings”), which set aside the Delta Plan

¹ LAND member agencies cover an approximately 120,000-acre area of the Delta. Current LAND participants include: Reclamation Districts 3, 150, 307, 317, 407, 501, 551, 554, 744, 755, 813, 999, 1002, 2067, 2011 and the Brannon-Andrus Levee Maintenance District. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

for non-compliance with the Delta Reform Act, “there is no longer a project for which to conduct a CEQA analysis and review.” (Addendum, p. 84.) The Rulings require the DSC to materially revise the Delta Plan and associated regulations in order to comply with the DRA without addressing CEQA adequacy. (See, e.g., Ruling, pp. 26, 38, 72.) The DSC should not attempt to revise a CEQA document for a project, which no longer exists. (See CEQA Guidelines, § 15164.) If the DSC wishes to revise the Plan by extending the “covered action” exemption for single-year transfers, it must perform a new CEQA analysis on the revised Delta Plan. (Pub. Resources Code, § 21080.)

Thus, because there is not a valid project at this time, DSC should not attempt to revise the Delta Plan or adopt an Addendum to the PEIR.

B. The Proposed Action Would Be Inconsistent with the DRA

Exempting all single-year transfers from “covered action” status under the Delta Reform Act (Wat. Code, §§ 85000 et seq. (“DRA”)) is fundamentally inconsistent with the purposes of the DRA. The DRA was enacted to achieve the coequal goals of providing a “reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Wat. Code, § 85054.) Exempting without limitation all single-year transfers from covered action status favors supplying water to the detriment of the goal of protecting the Delta ecosystem. By extending this exemption indefinitely, the DSC would give all potential transferors the incentive to structure transfers as single-year transfers to avoid both environmental review CEQA, and consistency review under the DRA, even where all parties intend to continue substantially the same transfer year after year. The DSC has presented insufficient information to support its conclusion that these serial transfers do not lead to essentially the same result as long-term transfers.

Further, though the DSC claims that the Addendum does not change the CEQA requirements for any transfer (Addendum, pp. 128-29), this is irrelevant to LAND’s argument that there are some transfers which, without this exemption, would escape CEQA and NEPA analysis, but *would* be subject to a determination of whether they are consistent with DRA’s co-equal goals. This would provide at least some review of the effects of these transfers on the environment and on the ability to meet the coequal goals. The DSC does not claim otherwise, but refuses to admit that extending the exemption from consistency review that would otherwise occur will allow some transfers to completely evade all environmental review, in contravention to the purposes of the DRA.

C. The Addendum Has Not Provided an Adequate Response to Several of LAND's Comments

There were several additional deficiencies in the Draft Addendum that the DSC did not provide a meaningful response to in the Final Addendum. They are listed below with clarifying information where appropriate.

- LAND 5

The proper baseline against which to measure the effects of this action is not a situation where all short-term transfers are exempt from “covered action” status, but a situation where the DSC must determine whether each short-term transfer is a “covered action” under Water Code section 85057.5. CEQA requires agencies to describe environmental conditions as they exist at the time environmental analysis is performed. (CEQA Guidelines, § 15125, subd. (a).) The conditions that existed at the time the DSC undertook this analysis is that all short-term water transfers occurring prior to January 1, 2017, would be treated as they were not covered actions, and all short term water transfers occurring thereafter would need to be reviewed to determine whether they are covered actions. (Cal. Code Regs., tit 23, § 5001, subd. (dd)(3).) DSC's only response to this comment on the Draft Addendum was to restate a flawed understanding of “existing conditions” (Addendum, p. 129), in effect claiming that protective environmental regulatory standards are not part of the environmental baseline. DSC is incorrect. This action would permanently exempt all short-term transfers from DRA “covered action” analysis; the existing conditions would require all such transfers to undergo this analysis to ensure the transfers are consistent with the co-equal goals of the DRA. This constitutes a significant change. For this same reason, the arguments in the Statement of CEQA exemption (Item 10, Attachment 6B) are incorrect.

- LAND 6 and 7

In response to each of these comments, DSC claimed that it relied upon the *Department of Water Resources and Bureau of Reclamation Water Transfer White Paper* (“White Paper”) to consider impacts to Water Resources and Groundwater. (Addendum, p. 129.) The *White Paper*, however, is not a CEQA document. An addendum may not tier any part of its impacts analysis from a document not subject to CEQA review. (See CEQA, § 21094.)

D. Conclusion

DSC may not use this Addendum as sufficient CEQA review to extend indefinitely short-term water transfers exemption from “covered action” status first because, as the Addendum admits, there is no longer a project. Further, even if there was still an active project, this change would be inconsistent with the DRA because it would favor the “co-equal” goal of water supply over restoring and protecting the Delta. Finally, the DSC has not responded to LAND’s comments on why this Addendum fails to adequately analyze the environmental impacts that would result from making this change.

For the above reasons, the Addendum provides insufficient environmental review of the DSC’s proposed decision to exempt all short-term water transfers from consistency review under the DRA. In particular, no amendments to the Delta Plan are appropriately considered until the DSC presents a legally adequate Delta Plan, and the DSC should not further complicate remedies pertaining to the Delta Plan litigation by moving forward with amendments at this time.

Very truly yours,

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By: 
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cc: Bethany Pane, Acting Chief Counsel (Bethany.Pane@deltacouncil.ca.gov)